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No. 732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., *Petitioners,*

v.

JEWEL TEA COMPANY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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1. In an attempt to show that the National Labor Relations Act is not applicable to this controversy, respondent asserts that the limitation upon evening marketing hours is not relevant to the butchers' wish not to work evenings. For this purpose, respondent relies upon the overtime provision of the collective bargaining agreements (Opp. pp. 4, 17-18). The overtime provision states that (R. 22-23, 37):

> Overtime may be worked *behind locked doors* at overtime rates from 8:00 a.m. to 9:00 a.m., after 6:00 p.m., and after eight (8) hours in any one day, at the Employer's discretion. [Emphasis supplied.]

Respondent urges that the contractual authorization of the performance of overtime work "at the Employer's discretion" shows that the butchers have no objection to working evenings. Respondent misconceives the function of the clause. It overlooks the contractual requirement that overtime may be worked "behind locked doors" only. The "behind locked doors" requirement constitutes explicit recognition that overtime may be worked before 9:00 a.m. or after 6:00 p.m. only if the market remains closed during those hours. There is no commitment to work after 6:00 p.m. if the market remains open after 6:00 p.m. On the contrary, the agreement specifically negates any such commitment.

Once it is understood that overtime may be worked after 6:00 p.m. "behind locked doors" only, and not in conjunction with marketing hours after 6:00 p.m., the reason for this very limited authorization to work overtime is clear. Overtime is authorized to meet such special and emergent situations as the late arrival of a shipment of meat, a special sale requiring greater cutting in preparation for it, the opening of a new store, or shortness of help during periods of vacation relief. The unimportant incidence of overtime is illustrated by that provision of the self-service contract which states that (R. 36):

> There shall be no clean-up time after 6:00 p.m., except clean-up may be performed after 6:00 p.m. provided that overtime is paid for all work performed after 6:00 p.m.

Overtime is therefore permitted to meet the needs of marketing between 9:00 a.m. and 6:00 p.m., not before or after those hours. It is obvious that, in the absence of marketing hours after 6:00 p.m., the cir-

cumstances when it would be necessary to work after 6:00 p.m. would be small indeed, and hence allowance of overtime to meet these exceptional circumstances does not represent any significant inroad into the usual 6:00 p.m. stopping time. It is only enlargement of marketing hours after 6:00 p.m. which would seriously impair the butchers' wish not to work after that hour. It is that which would make working after 6:00 p.m. a routine affair rather than an unusual circumstance. Respondent can hardly draw from the authorization of overtime work in extremely limited circumstances the conclusion that butchers have no objection to working overtime generally.

Indeed, despite its protestations that hours of work are not at the heart of the controversy, respondent's complaint recognizes that the petitioner unions' objection is that evening marketing hours would interfere with the wish of the butchers not to work evenings, for it attempts unsuccessfully to show that the two are not incompatible. Thus, paragraph 11 of the complaint alleges that (R. 7):

> Plaintiff respectfully shows that under the "prepackaged, self service" system of vending meat a butcher *need not be on duty in the store* at the time the customer selects his or her desired cut of meat and actually makes the purchase; that the packaged cuts of meat can be, and are, safely and properly stored, displayed and made available for customer selection and self-service in refrigerated condition so that *there is no necessity for members of the defendant unions being on duty in plaintiff's stores at all hours* at which meats are actually purchased by the customers; that the incidental tasks of arranging the cuts in the cases and cleaning the cases *need not be performed continuously throughout store hours and can be*

performed by others or can be performed by butchers some hours prior to the ending of store hours. [Emphasis supplied.]

The emphasized parts of the allegation are pointless except to overcome the objection that evening marketing hours do require evening working hours. We have outlined the reasons which show that this allegation fails to overcome the objection (Pet. pp. 10-14), and since it fails, there is no escape from the conclusion that the issue of working hours is fundamental to this controversy.

Finally, if, as respondent would have it, it may sell meat after 6:00 p.m. and butchers are obligated to work after 6:00 p.m. at its discretion, this conclusively demonstrates the relationship of marketing hours to working hours. For, under its view, ~~petitioner~~ respondent would be authorized to require butchers to work nights in order to provide the meat to sell at night. The position is therefore incontestable, we believe, that working hours and marketing hours do march abreast of each other. One cannot be increased without increasing the other.

2. We have dwelled upon this matter because it illustrates the lengths to which it is necessary to go in order to avoid the applicability of the doctrine of primary jurisdiction. For the essence of respondent's position, as it was of the decision below, is that "it can hardly be argued" that the contractual regulation of marketing hours serves to safeguard the unions' interest in limiting working hours (Pet. p. 7a). This means not only that a collective bargaining relationship between the two is not fairly arguable on the face of the complaint and the contracts annexed to it, but also that it is not reasonably foreseeable that a trial

would produce a set of facts placing the subject within the realm of fair argument. For however "bad" a complaint may paint an agreement, "it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result." *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 487-488. And so the court below was forced to the position that no set of circumstances is reasonably conceivable which would call into play the Board's competence to decide initially whether marketing hours is a mandatory subject of collective bargaining. It not only bypassed the Board, but to justify that course, it compounded its error by apparently foreclosing inquiry into this subject upon a trial before the District Court itself; for it could not consistently say that "it can hardly be argued" that marketing hours is a mandatory subject of collective bargaining and at the same time remit the unarguable to the District Court for argument. And so the logic of the position of the court below seemingly brought it to the conclusion that the question whether marketing hours is a mandatory subject of collective bargaining is closed to plenary inquiry before any tribunal. Yet it is obvious that either the Board or the District Court must be open. It is important that this Court decide which of the two is the proper forum. And equally important is the companion question of how much must be determinable from the complaint before initial decision is committed to the Board.

3. Respondent contends that the doctrine of primary jurisdiction is not applicable because retail distribution of food is not a "regulated" industry (Opp. pp.

11-13). It is of course true that a food retailer is not regulated in the same sense as is a carrier. But the point of regulation relevant to primary jurisdiction is that judicial action is sought upon a subject which implicates a statutory standard of conduct administered by an agency. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63-65. What is pertinent is that the subject is regulated; it does not matter that as to unrelated subjects the industry is unregulated. And it can hardly be doubted that in this relevant sense the National Labor Relations Act regulates. This Court has referred to "the multitude of activities *regulated* by §§ 7 and 8 of the National Labor Relations Act"; it spoke of this as the "area of *regulation*"; it observed that "Administration is more than a means of *regulation*; administration is *regulation*"; it described the covered activities as "the subject of national *regulation*"; and it concluded that the "governing consideration is that to allow the States to control activities subject to federal *regulation* involves too great a danger of conflict with national labor policy." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241, 243, 244, 246 (emphasis supplied). Whether regulation by the National Labor Relations Act which excludes state action also requires application of the doctrine of primary jurisdiction is a question this Court should decide.

4. Respondent asserts that the doctrine of primary jurisdiction should not apply because the "General Counsel might exercise his discretion not to issue a complaint . . ." (Opp. p. 17). This was a facet of the regulatory scheme, described by this Court as a "narrow area," which had not escaped this Court's attention in concluding that state action was preempted

(*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245-246):

> . . . the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance.

Whether this "narrow area," irrelevant to preemption of state action) should be enough to avoid the applicability of the doctrine of primary jurisdiction, is a question which emphasizes the appropriateness of review by this Court. Only this Court can authoritatively say whether a material difference exists. We do not probe the merits, for that is not the function of a petition. Enough has been shown, we believe, to demonstrate that the court below "has decided an important question of federal law which has not been, but should be, settled by this court. . . ." Rule 19(1)(b), Revised Rules of the Supreme Court of the United States.

Respectfully submitted,

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